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Nos. 84-1148, 84-1164, and 84-1403

In the Supreme Court of the United States

OCTOBER TERM, 1984

RUSSELL HOBSON, III, PETITIONER

v.

UNITED STATES OF AMERICA

PATRICK C. WALDROP, PETITIONER

v.

UNITED STATES OF AMERICA

MANUEL ERIC VILLANUEVA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether marijuana offenses may serve as predicate offenses for prosecutions under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962.

2. Whether two or more offenses arising out of the same criminal episode satisfy the predicate act requirement of the RICO statute.

3. Whether the jury instructions were sufficient to ensure that petitioner Waldrop would not be convicted on the RICO charges in the indictment unless the jury found the existence of an enterprise and the commission of multiple enterprise-related offenses.

4. Whether the court of appeals correctly sustained the validity of two amendments to a wiretap authorization issued by a state judge.

5. Whether petitioner Hobson was deprived of due process because the court of appeals' review of his sufficiency claim allegedly was based upon inaccurate factual statements in the government's brief.

6. Whether a pre-trial order disqualifying petitioner Hobson's original counsel because the anticipated trial testimony of two government witnesses was likely to implicate the lawyer in some of the charges in the indictment became erroneous when the implicating evidence was not adduced at trial.

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OPINION BELOW

The opinion of the courts of appeals (Pet. App. 1-50)[1] is reported at 742 F.2d 1335.

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[1]"Pet. App." refers to the appendix to the petition in No. 84-1148 unless otherwise indicated.

JURISDICTION

The judgment of the court of appeals was entered on October 1, 1984. Petitions for rehearing filed by each petitioner were denied on December 6, 1984 (84-1148 Pet. App. 51-52; 84-1164 Pet. App. C1-C2; 84-1403 Pet. App. 51-52). The petition for a writ of certiorari in No. 84-1148 was filed on January 16, 1985, the petition in No. 84-1164 was filed on January 17, 1985, and the petition in No. 84-1403 was filed on March 5, 1985.[2] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Florida, petitioners were convicted of conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act (RICO) (Count 1); the completed RICO substantive offense (Count 2); conspiracy to import marijuana (Count 3); importation of marijuana (Count 4 (Hobson and Waldrop only)); conspiracy to possess marijuana with intent to distribute (Count 5); possession of marijuana with intent to distribute (Count 8 as to Villanueva, Count 9 as to Waldrop, and Count 10 as to Waldrop and Hobson); and engaging in a continuing criminal enterprise (Count 25 as to Villanueva), in violation of 18 U.S.C. 1962 and 21 U.S.C. 963, 952, 846, 841 and 848. Petitioner Hobson was sentenced to consecutive terms of imprisonment for each count on which he was convicted totalling 35 years; he also was fined a total of $110,000 on Counts 1 through 5 and Count 10. Petitioner Waldrop was sentenced to consecutive terms of imprisonment for each count on which he was convicted totalling 40 years; he also was fined various sums on each count, totalling $125;000.

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[2]On January 19, 1985, Justice Powell extended the time for the filing of petitioner Villanueva's petition for a writ of certiorari (No. 84-1403) to and including March 6, 1985.

Petitioner Villanueva's consecutive sentences totalled 60 years' imprisonment, and his cumulative fines amounted to $220,000. In addition, each petitioner was given a two-year special parole term. The court of appeals affirmed the convictions of Hobson and Waldrop in all respects. In light of the affirmance of his continuing criminal enterprise conviction, Villanueva's convictions for conspiracy to import marijuana and conspiracy to possess marijuana with intent to distribute (Counts 3 and 5) were vacated on double jeopardy grounds (see *Jeffers* v. *United States*, 432 U.S. 137 (1977)). Villanueva's convictions on all other counts were affirmed.

The evidence showed that in late 1977 Villanueva and co-defendants Jose Acosta and Antonio Bascaro were operating a large marijuana importation organization in southern Florida (38 R. 148-150).[3] In the latter part of that year, Clyde ("Bill") Cobb became a member of the organization, assuming responsibility for storing the marijuana after importation and distributing the marijuana to wholesalers (38 R. 150). Before that year's end, Cobb recruited his brother-in-law, Dan Abbey, to keep track of the organization's accounts (40 R. 10). Abbey estimated that during the time of his participation in the enterprise approximately 750,000 to 1.5 million pounds of marijuana had been imported and distributed, generating proceeds in excess of $175,000,000 (40 R. 66-67).

In December 1977, the enterprise moved its operations to northern Florida (38 R. 150-151; 40 R. 10-11). A farm suitable for storing marijuana was located near Cottondale, Florida (38 R. 150). Cobb made a cash down payment of $180,000 to buy the farm, using funds belonging to Acosta and Bascaro and delivered to him by petitioner Villanueva (38 R. 152-153). Shortly thereafter, more than 40,000

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[3] "R." refers to the 50-volume record on appeal.

pounds of marijuana that had been carried aboard a converted shrimper, the *Tanila,* was transferred to the farm (40 R. 10-12). Villanueva was among those supervising the offloading (40 R. 11). Within two or three days, several buyers, including Waldrop and Hobson, arrived at the farm to purchase quantities of the cargo (38 R. 154). On this occasion, Waldrop bought 10,000 pounds (40 R. 14). After the entire load had been distributed, Abbey collected the moneys due from the buyers; in turn, he made periodic trips to Acosta's house in the Miami area, where he turned the payments over to Villanueva (40 R. 15-16). The total amount delivered for the *Tanila* load was between $8 and $9 million (40 R. 15).

In January 1978 another vessel, the *Navigator,* arrived at a clandestine offloading site near Fort Walton Beach (40 R. 18-19), and 40,000-45,000 pounds of marijuana were offloaded in the presence of Villanueva and other supervisors (38 R. 150; 40 R. 19-20). The cargo was transported to the Cottondale farm, weighed and stored there (34 R. 134-135; 40 R. 20), and subsequently distributed to customers, including Waldrop and Hobson (34 R. 135-136; 38 R. 157-158). Following distribution, Abbey once again made the rounds of the buyers to secure payment. He then proceeded periodically to Acosta's home to hand over the receipts to either Acosta or Villanueva. The total amount collected was about the same as for the *Tanila* load—$8 or $9 million. 40 R. 20-21.

After a third load of marijuana had been stored at the Cottondale farm and distributed to customers from that site, the leaders of the trafficking enterprise became concerned that the neighbors were suspicious of activities at the farm. Accordingly, they purchased a fishing camp on the Aucilla River in the Florida panhandle and a farm in Madison County to serve as new offloading and storage sites. 38 R. 160-163. In mid-March a load of marijuana arrived at

the fishing camp by vessel, and the cargo was successfully transferred to the Madison County farm, from which it was distributed without incident (38 R. 162). As before, Abbey collected millions of dollars from the buyers of this shipment and turned the proceeds over to Villanueva (40 R. 49).

In late March or early April another vessel, the *Miss Too Nicey,* reached the fishing camp (36 R. 139-140; 38 R. 163). In the presence of Acosta, Bascaro, and Villanueva, the vessel's 73,000-pound cargo of marijuana was offloaded and trucked to the Madison County farm (36 R. 140-141, 144; 38 R. 163). There, the weighing and storage was conducted in the presence of Villanueva, Bascaro, and Thomas Alexander (36 R. 141). Shortly thereafter, Hobson and an associate came to the farm in an 18-wheel truck to take 25,000 pounds of marijuana. Hobson revealed to Alexander that he and Waldrop were partners. 36 R. 141-143; 40 R. 55.

The use of the Madison County farm as a storage facility lasted only about one month. During that period, state law enforcement officers became suspicious of the activities occurring at the farm and commenced surveillance (31 R. 68-70). When Alexander and others detected the surveillance, the leaders of the enterprise decided to find a new storage facility (36 R. 145).

In April 1978 the enterprise rented a warehouse in Tallahassee, and the 6,000 pounds of marijuana remaining at the Madison County farm were transferred to the warehouse (36 R. 146-147). That warehouse proved to be too small to store an expected double load—80,000 pounds of marijuana. Consequently, the enterprise leased a second warehouse in Tallahassee. GX 10; 31 R. 148-150. On two consecutive evenings in late April, boatloads of marijuana were offloaded at the fishing camp and trucked to the larger warehouse in Tallahassee (36 R. 147; 38 R. 168-169). Waldrop visited the warehouse and set aside 40,000 pounds for

pickup later that week (40 R. 53). Before Waldrop could make his pickup, however, state law enforcement officers entered the warehouse, seized 70,293 pounds of marijuana, and arrested six individuals (31 R. 74-79, 93, 151; 36 R. 148; 40 R. 52-53). The officers also seized detailed records of amounts received, amounts distributed, and money owed by a number of individuals. Listed among the debtors were "Pat" (Waldrop) and "Russ" (Hobson) (31 R. 85-89).

While the officers were inspecting the warehouse, Waldrop arrived there in a rented car. He was stopped and questioned by a police officer, and he consented to a search of a briefcase in his car. Inside the briefcase the officer found a notebook and loose sheets, all of which contained records of marijuana transactions. 31 R. 79-81. Some of the items (GX 7) were duplicates of records kept by Abbey for Acosta and Villanueva (GX 145; 40 R. 44-46). Although the records were seized, Waldrop was released (31 R. 89-90). He telephoned Cobb and reported the loss of the records (38 R. 170).

Because of the loss of the large Tallahassee warehouse, the need for a new storage site again arose. That need became urgent when Cobb learned that 150,000 pounds of marijuana already were en route to Florida (38 R. 175). A member of the enterprise located a tobacco barn deemed suitable for use as a storage facility near the town of Quincy in Gadsden County, Florida (*ibid.*).

Three vessels were involved in the 150,000 pound delivery. The first was successfully offloaded, after which the marijuana was transferred to the Quincy barn (38 R. 175). The other two vessels were sent out to sea for a few more days because the offloaders could not handle them immediately (38 R. 175-176). While at sea, those vessels were boarded by Coast Guard officers, and their cargo of marijuana was seized (31 R. 238-240; 34 R. 4-6; 38 R. 175-176). On July 21, 1978, local officers, armed with a warrant,

searched the Quincy barn and seized numerous bales of marijuana and drug paraphernalia (31 R. 253-255).

Thereafter, a meeting was held at Cobb's home in southern Florida to discuss moving the enterprise to Georgia (38 R. 177-178). Among the participants in the discussions were Cobb, Acosta, Bascaro, and Villanueva (38 R. 178-179). Arrangements were made to use Morgan's Boat Dock in Savannah (33 R. 22-25; 34 R. 154). On November 24, 1978, the *Sea Star* arrived there with a cargo of marijuana weighing 40,224 pounds (32 R. 32-37). Federal law enforcement officers intercepted the vessel and seized its cargo (32 R. 31-35).

Shortly thereafter, Cobb decided to engage in a new venture (39 R. 44-47). Instead of using boats, Cobb decided to attempt to smuggle marijuana by airplane (38 R. 186). In mid-January 1979, pursuant to Cobb's plan, James McDonnell flew a DC-3 airplane to Colombia, took on a cargo of marijuana, and flew back to Fort Lauderdale. The plane and its cargo were seized by federal and local law enforcement agents at the Fort Lauderdale airport. 32 R. 127, 151-154.

Two weeks later, McDonnell agreed to make a second attempt to smuggle marijuana by aircraft (32 R. 156-157). Waldrop had made a down payment of $1,500,000 to Abbey, and he and Hobson consequently expected to receive a substantial part of the planeload of marijuana (38 R. 187; 40 R. 55). Waldrop and Hobson pressured Cobb to produce the marijuana or return the $1,500,000 (38 R. 220-223). On February 13, 1979, McDonnell and two others flew to Colombia in a Lockheed Constellation and obtained 25,795 pounds of marijuana (32 R. 140, 160-161). Trucks furnished by Waldrop and Hobson were readied to meet the airplane at a clandestine site to take possession of most of the Constellation's cargo (39 R. 10-12). On the return flight,

however, fog and engine problems prevented the Constellation from landing at the clandestine site (32 R. 163-166). McDonnell finally landed at an airport in Panama City in the early morning hours of February 14 (32 R. 166). Federal agents arrested the crew members and seized the marijuana (32 R. 132-140, 167; 38 R. 187-188). Several hours after the Constellation was supposed to have arrived at the pre-arranged site, Hobson telephoned Cobb to ask what had happened (39 R. 18).

At the same time that Cobb was planning the airplane smuggling ventures, he met with Acosta, Bascaro, and Villanueva to discuss a second attempt to bring a boatload of marijuana into Savannah (38 R. 186, 188). In March 1979 a vessel with 40,000 pounds of marijuana reached Savannah, but it was detected there by law enforcement officers (38 R. 188-191). After that loss, the principals decided once again to use the Aucilla River fishing camp as their offloading site (38 R. 191). In April 1979, two boatloads of marijuana were successfully offloaded there (38 R. 193). After distribution to buyers, Abbey made his rounds and then transferred between $15 and $18 million to Villanueva or another individual acting in his stead (40 R. 56-57).

No further activity occurred until early 1981. Then, the *Miss Sunbury* was sent from Key West to obtain a load of marijuana (38 R. 194-195). Carrying 23,460 pounds of marijuana, the *Miss Sunbury* reached the Aucilla River fishing camp without detection (32 R. 210-211; 38 R. 195); however, it was sent back to sea without having been emptied of its cargo because Villanueva, after performing a quasi-religious ritual, had determined that the time for offloading was not satisfactory (38 R. 195). On February 26, 1981, Customs officers boarded the *Miss Sunbury* and seized its cargo of marijuana (32 R. 207, 211).

ARGUMENT

1. The sole argument common to all three petitions (and the only issue raised by petitioner Villanueva) is he contention that petitioners' large scale marijuana trafficking scheme does not constitute "racketeering activity" within the meaning of RICO, 18 U.S.C. 1961(1)(D). The court of appeals' conclusion to the contrary is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review of the issue is therefore unwarranted.

The RICO statute, 18 U.S.C. 1962(c), makes it unlawful for any person associated with an enterprise engaged in interstate commerce to participate in the conduct of the affairs of the enterprise through a pattern of racketeering activity. "Racketeering activity" is defined under 18 U.S.C. 1961(1)(D) to include certain state felonies and enumerated violations of federal criminal laws, including "the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotics or other dangerous drugs, punishable under any law of the United States." Petitioners contend that the absence of any explicit mention of marijuana in this definition signifies an intent on the part of Congress to exclude marijuana violations from the class of offenses that may form the basis for a conviction under RICO. Petitioners therefore claim that their RICO convictions, which were premised solely upon involvement in marijuana trafficking, must be reversed.

As petitioner Waldrop notes (84-1164 Pet. 28), the same issue was raised in *Gustafson* v. *United States*, cert. denied, No. 84-482 (Jan. 21, 1985). We are furnishing petitioners' counsel with copies of our brief in opposition in *Gustafson;* that brief fully responds to most of petitioners' contentions. As we noted in that brief (at 5), it appears that Congress deliberately deleted a specific reference to "marijuana" that had appeared in early drafts of the RICO legislation

because marijuana was encompassed within the phrase "other dangerous drugs" that was added to the bill that Congress enacted into law. Consequently, the earlier references to marijuana became surplusage. Moreover, the express legislative mandate that the RICO statute "shall be liberally construed to effectuate its remedial purposes" contradicts the narrow interpretation advanced by petitioners. Pub. L. No. 91-452, § 904(a), 84 Stat. 947, 18 U.S.C. 1961 note; see 84-482 Br. in Opp. at 6-7. Certainly, the purposes of the RICO statute are furthered by applying it to offenses relating to the sort of massive marijuana trafficking enterprise involved in this case.

Petitioner Hobson makes one additional argument on the marijuana issue. He contends (84-1148 Pet. 11) that the enactment in 1980 of an amendment to 21 U.S.C. 841 increasing the penalties for large-scale marijuana trafficking was deemed necessary by Congress because at that time —ten years after the passage of RICO—Congress was concerned that the penalties for trafficking in marijuana were inadequate. Hobson argues that if Congress had believed that dealing in marijuana was encompassed within the RICO statute, which carries a maximum prison term of 20 years and a fine of up to $25,000 upon conviction (18 U.S.C. 1963(a)), it would not have been concerned about the fact that the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. 801 *et seq.*, limited the prison term for a convicted marijuana violator to five years, no matter how much marijuana was involved in the case. In Hobson's view, therefore, the 1980 amendment to 21 U.S.C. 841 was the result of Congress's belief that the 20-year RICO penalty did not apply to marijuana cases.

However, as Hobson readily admits (84-1148 Pet. 11), Congress made no mention of RICO coverage when it increased the penalties for trafficking in marijuana. The legislative history shows that the increased penalties were

passed as an amendment to the Infant Formula Act of 1980, Pub. L. No. 96-359, 94 Stat. 1190 *et seq.*, and that the sole purpose of the amendment was to correct what Congress believed to have been an oversight in the enactment of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. 801 *et seq.* As Representative Carter stated, "Mr. Speaker, in 1970, I was a member of the Commerce Committee when it passed the Controlled Substances Act. Unfortunately, we did not make the penalties for marihuana as strict as they should have been." 126 Cong. Rec. 11791 (1980).

Moreover, when the amendment was enacted in 1980, the courts of appeals were in conflict as to whether RICO applied to purely illegal enterprises such as the one in which petitioners were involved. Until this Court resolved the question in *United States* v. *Turkette*, 452 U.S. 576 (1981), the practical use of the RICO statute to prosecute marijuana traffickers was uncertain for reasons quite apart from the issue presented here. Finally, the 1980 amendment to Section 841 substantially increased the fine for large-scale marijuana offenses (from $15,000 to $125,000) to a level far in excess of the fine that could be imposed under RICO, and also provided for the cumulation of prison sentences in excess of RICO's maximum in the case of a series of marijuana violations. In these circumstances, Congress's decision in 1980 to increase the penalties for trafficking in more than 1,000 pounds of marijuana cannot be taken as any reflection upon the legislative intent ten years prior thereto regarding the propriety of including marijuana as a "dangerous drug" encompassed by RICO.

2. The RICO statute, 18 U.S.C. 1961(5), requires the government to prove that the defendant committed at least two "predicate acts" of racketeering activity. Petitioner Hobson alleges (84-1148 Pet. 12-15) that because both of the predicate offenses of which he was convicted arose out

of the same criminal transaction, *i.e.*, the Constellation episode, he did not engage in a "pattern" of racketeering activity as required by RICO. Hobson's attempt to limit RICO coverage to separate transactions finds no judicial support; indeed, every court that has considered Hobson's argument has rejected it. *E.g., United States* v. *Pepe*, 747 F.2d 632, 661-663 (11th Cir. 1984); *United States* v. *Phillips*, 664 F.2d 971, 1039 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982); *United States* v. *Weatherspoon*, 581 F.2d 595, 601-602 (7th Cir. 1978); *United States* v. *Parness*, 503 F.2d 430, 441-442 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975); *United States* v. *Salvitti*, 451 F. Supp. 195, 199-200 (E.D. Pa. 1978), aff'd, 588 F.2d 824 (3d Cir. 1978) (Table).

These decisions are supported by the plain language of the statute. RICO defines racketeering activity in terms of felonious offenses, not transactions. 18 U.S.C. 1961(1)(D). Hobson does not contend that he did not commit two separate felonies, and nothing in the statutory language requires that the two offenses constituting the RICO predicates be premised upon two separate and distinct criminal transactions. Moreover, nothing contained in Hobson's excerpt (84-1148 Pet. 13) of S. Rep. 91-617, 91st Cong., 1st Sess. 158 (1969), discussing the meaning of "pattern of racketeering activity," conflicts with the unanimous view of the courts that two criminal offenses may comprise the requisite pattern even though they are part of the same ongoing criminal episode. Accordingly, further review of this issue is not warranted.[4]

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[4]Hobson also argues (84-1148 Pet. 14) that the Department of Justice guidelines in effect at the time he was indicted proscribed the bringing of a RICO indictment based upon a pattern of racketeering activity growing out of a single criminal episode or transaction. As Hobson acknowledges, however, the guidelines do not confer any rights upon defendants. The preface to the Department's RICO guidelines always has provided that they are for internal guidance only and that they "are not intended to, do not, and may not be relied upon to create any rights,

3. a. Petitioner Waldrop contends that his RICO convictions were improperly premised on a single predicate act. In fact, three predicate acts supported Waldrop's conviction on the RICO counts—two offenses related to the Constellation episode and one related to the Tallahassee warehouse. Nevertheless, Waldrop argues (84-1164 Pet. 11-17) that his RICO convictions cannot stand because the Constellation episode was a separate endeavor of Cobb's that was wholly unrelated to the activities of the RICO enterprise. Waldrop contends that the district court failed to give the jury proper instructions on the concept of a RICO enterprise, thereby erroneously allowing the jury to consider the Constellation episode as enterprise-related.

The court of appeals correctly rejected Waldrop's attack on the jury instructions (Pet. App. 43-44). Contrary to Waldrop's contention (84-1164 Pet. 16 (emphasis added)), the instructions given by the district court did not permit the jury to conclude that "*any* criminal activity related to the importation of marijuana by any of the persons charged in the indictment" was sufficient "to link that defendant inescapably to a racketeering enterprise." On the contrary, the district court instructed the jury that the government had to prove beyond a reasonable doubt that "*the [predicate] offenses were connected with each other by some common scheme, plan or motive so as to constitute a pattern, and not merely a series of disconnected acts.*" Pet. App. 43 (emphasis in original).

In addition, as the court of appeals determined (Pet. App. 45), there was ample evidence to connect the Constellation episode with the marijuana trafficking RICO enterprise

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substantive or procedural, enforceable at law by any party in any matter civil or ciminal." U.S. Dep't of Justice, *United States Attorneys' Manual* § 9-110.200 (Mar. 1984). Furthermore, the guidelines do not place any limitations on otherwise lawful litigative prerogatives of the Department of Justice. *Ibid.*

even though some key members of the enterprise did not actively participate in that venture. Among those enterprise participants who did were Cobb, Hobson, Waldrop, co-defendants Manuel James, Clifford Wentworth, and John M. Araneo, and unindicted co-conspirators (and government witnesses) Carlton Reeves and James Sellers. Indeed, the only differences between the Constellation scheme and the other ventures of the enterprise were the use of an airplane instead of a vessel and the exclusion of Acosta, Bascaro, Villanueva, and another co-defendant, Gustavo Fernandez, from the initial planning and proposed sharing of profits. These distinctions did not make the Constellation episode a wholly distinct activity. The time frame coincided with the life of the enterprise, the goal was the same as that of the enterprise, the statute violated was the same as the one customarily violated by the enterprise, there was a continuity in the pattern of roles, and the geographical area was identical to that in which the enterprise otherwise operated. See *United States* v. *Lemm*, 680 F.2d 1193, 1199 (8th Cir. 1982), cert. denied, 459 U.S. 1110 (1983). The fact that Cobb, rather than Acosta, Bascaro, or Villanueva, orchestrated the venture and considered it separate from the enterprise's affairs did not necessarily make it so (see 84-1164 Pet. 14).

b. Waldrop also urges this Court to use his case as a vehicle to resolve an alleged conflict between the Eighth Circuit and other courts of appeals involving the manner in which the "enterprise" element in a RICO prosecution need be proved (84-1164 Pet. 18-26). The issue arose after *United States* v. *Turkette*, 452 U.S. 576 (1981), where this Court, in holding that RICO applies to wholly illegitimate as well as legitimate enterprises, stated (*id.* at 583) that the enterprise "is an entity separate and apart from the pattern of activity in which it engages." Relying on this language, the Eighth Circuit has held that a RICO enterprise must possess an ascertainable structure "distinct from that inherent in the

conduct of a pattern of racketeering." *United States* v. *Lemm*, 680 F.2d at 1198. See also *United States* v. *Bledsoe*, 674 F.2d 647, 665 (8th Cir. 1982); *United States* v. *Anderson*, 626 F.2d 1358, 1372 (8th Cir. 1980), cert. denied, 450 U.S. 912 (1981).

Other courts of appeals have rejected the Eighth Circuit's analysis of *Turkette*. *E.g.*, *United States* v. *Mazzei*, 700 F.2d 85, 89 (2d Cir.), cert. denied, 461 U.S. 945 (1983); *United States* v. *Cagnina*, 697 F.2d 915, 921 (11th Cir.), cert. denied, 464 U.S. 856 (1983). While these decisions recognize (as did the court below (Pet. App. 43)) that *Turkette* requires the government to prove both the existence of an "enterprise" and a "pattern of racketeering activity," they also recognize that *Turkette* does not require separate and independent proof of the two elements. *E.g.*, *Mazzei*, 700 F.2d at 89. Indeed, the Court expressly stated in *Turkette* that the proof used to establish the enterprise element "may in particular cases coalesce" with the proof offered to establish the pattern of racketeering activity. 452 U.S. at 583. Were this not the case, *Turkette*'s holding that an enterprise may include a group of individuals associated for wholly illegitimate purposes would be effectively negated. Thus, the enterprise element in a RICO prosecution may be proved, as it was in this case, by showing that an ongoing association of individuals who shared a common purpose acted together to commit a series of racketeering acts.

In any event, Waldrop has not demonstrated that the Eighth Circuit would have reversed his RICO convictions in this case. In *Lemm*, that court affirmed the RICO convictions of three defendants who participated in an insurance fraud scheme involving 17 arson fires. The court found (680 F.2d at 1201) that the government had established the existence of a RICO enterprise with a distinct, ascertainable structure because the proof showed not only that the

defendants had committed the predicate acts of mail fraud but also that they had engaged in "legitimate purchases and repairs of property."[5] Likewise here, the Eighth Circuit's requirement was satisfied because, in addition to the predicate acts of marijuana trafficking, the enterprise made legitimate purchases of farms and a fishing camp. Although the properties were used only to store marijuana for very brief periods, the enterprise did not immediately dispose of them after their usefulness as storage facilities had ended. Like *Lemm*, therefore, this case involved the use of the RICO statute as a weapon against "organized criminal activity" and not against a "sporadic and temporary criminal alliance to commit one of the enumerated RICO crimes" (680 F.2d at 1201). Because it is thus unlikely that the outcome of this prosecution turned on the jurisdiction in which it was brought, the case does not provide a proper vehicle for resolving a conflict among the circuits.

4. Petitioners Hobson and Waldrop claim (84-1148 Pet. 15-20; 84-1164 Pet. 26-28) that the court of appeals erred in upholding the validity of two amendments to a state wiretap authorization. The amendments were necessitated by the fact that Cobb, the target of the electronic surveillance, changed his telephone numbers after the issuing court had approved the initial wiretap application (Pet. App. 5, 11). In each of the two applications for authorization to amend the wiretap order to allow surveillance of the new telephone numbers, the affiant attached a copy of the original order, incorporated it by specific reference, and explained why it needed to be amended (*id.* at 11).

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[5]The defendants in *Lemm* purchased property to be burned. One of the defendants also "act[ed] as a private contractor and repair[ed] the fire damage in order to obtain a larger portion of the insurance proceeds." 680 F.2d at 1197.

Hobson and Waldrop argue that the Florida courts would not have approved the amendments because prior state court decisions have held that, when amendments are necessitated by a change of address during the authorized period of wiretapping, an application to amend must contain a full explanation as to why normal investigative techniques would be unworkable and may not simply incorporate a previous application by reference (84-1148 Pet. 18-20; 84-1164 Pet. 27). This claim was addressed in full by the court of appeals (Pet. App. 13-14). The court agreed that Florida law was controlling, but it rejected Hobson's and Waldrop's contention that the state courts would have disapproved the applications for amendments involved in this case. The court of appeals explained that the distinction between this case and the state intermediate appellate court decisions cited by Hobson and Waldrop lay in the fact that here only the telephone number, and not the residence, was changed and that such a change "could not conceivably have affected the efficacy of alternative investigative techniques." *Id.* at 14.

Petitioners' argument that the court of appeals misinterpreted Florida law by drawing a distinction between this case and the Florida decisions upon which they rely presents no substantial federal question.[6] In any event, it is

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[6]Hobson and Waldrop allege that the court of appeals should have certified the question to the Florida courts rather than answer it. Although certification was a possible course, it was not mandatory. Where, as here, the request to certify was not made until petitions for rehearing were filed, no issue of constitutional dimension was involved, the lawsuit already had been protracted, and the court of appeals obviously believed that it could resolve the issue with available research materials already at hand, its determination should not be disturbed simply because the certification procedure existed but was not used. *Lehman Brothers* v. *Schein*, 416 U.S. 386, 392-395 (1974) (Rehnquist, J., concurring); *Harman* v. *Forssenius*, 380 U.S. 528, 534-536 (1965); *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 328-329 (1964). If the rule were otherwise, federal courts could never resolve questions of state law without resort to available certification procedures.

adequately answered in the opinion of the court of appeals.[7] Moreover, nothing in the opinion below conflicts with *United States* v. *Smith,* 726 F.2d 852 (1st Cir. 1984) (en banc). Initially, we note that the court in *Smith* never discussed technical amendments such as those involved in this case; rather, the opinion dealt with the state law procedures for obtaining initial wiretap authorizations, renewals of those authorizations, and substantive amendments permitting the interception of calls involving persons other than those named in the initial authorizations.[8] In any event, the legal analysis employed by the court below is fully consistent with *Smith.* As here, the First Circuit in *Smith* looked to state law in upholding the validity of state wiretaps. The court concluded that the procedures employed by Massachusetts for authorizing applications and amendments violated neither federal law nor the state wiretap statute as

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[7]In a variation on the argument that the applications for the amendments did not comply with Florida law, Hobson also alleges (84-1148 Pet. 15-16) that the affiant, a state law enforcement officer, was not authorized to seek the amendments because the Florida wiretap statute allows only the Governor, the Attorney General, or a State Attorney to apply for a wiretap order. Hobson does not cite any authority for the proposition that simple amendments such as the ones involved here are encompassed within this statutory authorization requirement. Moreover, neither the federal nor the Florida statute contemplates that the high officials authorized to make applications for wiretaps must prepare each one personally and present it to the issuing judge. *Alexander* v. *Harris,* 595 F.2d 87, 89 (2d Cir. 1979); *United States* v. *Harvey,* 560 F. Supp. 1040, 1078 (S.D. Fla. 1982). Because none of the defendants raised this issue at trial, thereby in any event forfeiting their right to have it considered now (Fed. R. Crim. P. 12(b)), the record does not indicate whether the affiant had the permission of the State Attorney to seek the amendments.

[8]In an appendix to its opinion, the court in *Smith* listed all the applications, renewals, and amendments involved in the case (726 F.2d at 868). The appendix shows five initial applications, five renewals, and 14 amendments. Nearly all of the amendments were for the purpose of naming additional conversants. Only one amendment related to a change in telephone number, and the court's opinion nowhere discusses what procedures, if any, were required to obtain that amendment.

interpreted by the Supreme Judicial Court of Massachusetts.[9] Waldrop's allegation of a conflict between *Smith* and this case rests upon the erroneous premise that the court below confined its analysis to a "cursory treatment of Florida law" and "disregard[ed]" the fact that Florida law governed the validity of the applications (84-1164 Pet. 28). The opinion below demonstrates that the court did no such thing.

5. Petitioner Hobson argued in the court below (Pet. App. 35-39) that the evidence was insufficient to sustain his conviction on any of the six counts on which he was convicted. In this Court, he contends (84-1148 Pet. 21-27) that factual misrepresentations in the government's brief deprived him of due process of law because the court of appeals, in rejecting his sufficiency argument, "apparently chose to rely on the government's assertions" in its brief (*id.* at 24-25). This claim lacks merit.

At the outset, we acknowledge that the government's 154-page brief in the court of appeals contained one clear factual error. See page 22, *infra*. Moreover, we agree with Hobson that, upon discovery of this inadvertent mistake, the better course would have been for the government to advise the court of appeals of the error by letter or other supplemental pleading.[10] As for the other "misrepresentations" that Hobson attributes to the government (see pages

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[9]The fact that the First Circuit in *Smith* looked to an opinion of the Supreme Judicial Court of Massachusetts for guidance in interpreting the state wiretap statute does not demonstrate the existence of a conflict. The Massachusetts state court opinion was directly on point, whereas there are no controlling decisions of the Florida Supreme Court. As we have already shown, however, the absence of definitive state court precedent in Florida did not preclude the court of appeals from resolving the state law issue itself (see note 6, *supra*).

[10]While we agree with Hobson that the government should have corrected the error in its brief, we take issue with his assertion (84-1148 Pet. 25) that the error was other than inadvertent. The record in this

22-23, *infra*), our review of the record convinces us that the most that can be said is that the government's brief may have summarized the evidence against Hobson with less than complete precision. In fact, however, it appears to us that the "errors" alleged by Hobson—with the one exception noted—actually amount to nothing more than aggressive advocacy that Hobson has chosen, with equal or greater aggressiveness, to characterize as "horrendous misstatement[s]" (84-1148 Pet. 22). In any event, it is clear, as we demonstrate below, that Hobson could not have suffered any prejudice regardless of how one characterizes the government's brief and that the record evidence amply supports his convictions.

Contrary to the entire premise of Hobson's argument, the court of appeals' opinion shows that it did not simply adopt the factual assertions in the government's brief. In uncommon fashion, the opinion below contains its own record citations for the facts relied upon by the court in rejecting Hobson's sufficiency claim (Pet. App. 35-36). The inclusion of these references demonstrates that the court did not ignore the contentions made in Hobson's reply brief and at oral argument that there were misstatements in the government's brief. Accordingly, there is no basis for concluding that the court below abdicated its duty to make an independent examination of the record in light of the contentions advanced by the parties.

More importantly, the facts recited by the court of appeals (Pet. App. 35-36) are supported by the record. The record shows that petitioners Hobson and Waldrop were partners (36 R. 141-143; 40 R. 55); that Waldrop was one of

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multi-defendant case is massive, and the facts pertaining to each individual defendant are scattered throughout that record. In these circumstances, inadvertent errors, while regrettable, are certainly understandable.

the "best buyers" that the marijuana enterprise had (40 R. 55); and that Hobson and Waldrop dealt with the enterprise's accountant in connection with marijuana transactions on 25 or 30 occasions (40 R. 61-62). The record also shows that Waldrop, acting with Hobson and another individual, made a $1,500,000 advance payment for a shipment of marijuana by airplane; that Hobson subsequently told co-conspirator Bill Cobb that Cobb should either return the money or deliver the marijuana (38 R. 186-187, 220-223; 40 R. 54-55; GX 126); and that trucks furnished by Waldrop and Hobson came to the clandestine landing site in Florida where the Constellation was scheduled to arrive (39 R. 10-12). The record also shows the presence of both Hobson and Waldrop at various of the organization's stash houses. Specifically, both acquired marijuana at the Cottondale farm (38 R. 154); Waldrop stacked some of the marijuana at the Tallahassee warehouse (40 R. 53); and Hobson came to the farm in Madison County in an 18-wheel truck in order to acquire 25,000 pounds of marijuana (36 R. 142; 40 R. 55).

These facts from the record fully support the court of appeals' conclusion that, "[i]n light of the massive quantities of marijuana involved, the frequency with which Waldrop and Hobson had occasion to deal with the other members of the enterprise, the fact that Hobson, Waldrop and Cobb were described as the principal organizers of the Constellation episode * * *, and the presence of both Hobson and Waldrop at various of the organization's stash houses on numerous occasions" (Pet. App. 39), the jury was warranted in finding that Hobson knew the marijuana was imported. See *United States* v. *Corbin*, 734 F.2d 643, 652-653 (11th Cir. 1984). See also *Turner* v. *United States*, 396 U.S. 398, 416 n.29 (1970). These facts also support the court of appeals' conclusion that Hobson and Waldrop were more than "mere purchasers" and that the evidence was more than sufficient to show that they joined a conspiracy with the other co-defendants (Pet. App. 38).

Nor is it plausible to contend that the court of appeals' rejection of Hobson's sufficiency claim could have been premised upon government-induced inaccuracies. The statement of facts in the government's brief consisted of 31 pages with appropriate record references, and Hobson does not claim that there were any errors in that lengthy statement. Rather, his claim is directed to statements on pages 137 and 139 of the government's brief, made in response to Hobson's argument that the evidence was insufficient to sustain his convictions on Counts 3 and 4.

On page 139 of the government's brief, the government erroneously stated that Count 4 related to the *Tanila* boatload. We acknowledge that Count 4 charged Hobson with importing marijuana aboard the Constellation aircraft rather than the *Tanila*. But the court of appeals recognized this obvious mistake and placed no reliance on it; the court's opinion correctly states that "Hobson and Waldrop's convictions arose out of their involvement in two smuggling ventures: the 'Tallahassee warehouse' and 'Constellation' episodes" (Pet. App. 35). What Hobson characterizes as a "false statement, pure and simple" (84-1148 Pet. 24) thus played no role whatsoever in the affirmance of his conviction on Count 4.

Hobson also challenges (84-1148 Pet. 22) the government's characterization of the evidence to support his conviction on Count 3 (conspiracy to import marijuana) by attacking certain statements made on page 137 of the government's brief. There, referring to the various marijuana storage sites used by the enterprise, the government stated that "middlemen such as Hobson and Waldrop stood by awaiting the completion of the counting and weighing, after which they immediately removed sizable portions of the massive loads" (*ibid.*). The brief continued by stating, with reference to Hobson and Waldrop, that "[t]hey were not mere customers. Their constant readiness to take charge of large quantities of marijuana at whichever storage site

they had been directed to demonstrates that they played a substantial role in the importation activities" (*id.* at 137-138 (footnote omitted)).[11]

Hobson apparently objects to the representations that he and Waldrop were "standing by" and that they were "constantly ready" to purchase large quantities of marijuana (84-1148 Pet. 22). Hobson's objections on this score amount to little more than semantic quibbles. A more precise argument demonstrating that Hobson and Waldrop were not just mere customers and that they were ready to buy large quantities of marijuana would have noted that both of them visited the organization's stash houses, that Waldrop had stacked marijuana at the Tallahassee warehouse where

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[11]The full paragraphs from which petitioner quotes read as follows (Appellee Br. 137-138 (citations and footnote omitted)):

> In this case the government proved that conspirators other than Waldrop and Hobson brought marijuana from outside the United States to various locations in Florida and Georgia. The importation venture did not end at the shore, since the marijuana was immediately destined for an internal location. The internal destination points were storage sites such as different farms or a warehouse in Tallahassee. There, middlemen such as Hobson and Waldrop stood by awaiting the completion of the counting and weighing, after which they immediately removed sizable portions of the massive loads.
>
> From the evidence of presence at the storage sites at a delivery time the jury could fairly conclude that Waldrop and Hobson were trusted members of the enterprise and that they knew of the delivery plans in advance. From the frequency of their involvement the jury also could infer that Waldrop and Hobson knew of the scope of the delivery activity. They were not mere customers. Their constant readiness to take charge of large quantities of marijuana at whichever storage site they had been directed to demonstrates that they played a substantial role in the importation activities by providing assurances that the importation would be successful and by minimizing the risk of loss to the importers, a risk that increased with each moment that the marijuana remained in storage. In fact, on one occasion they paid $1,500,000 in advance for a part of the Constellation load.

40,000 pounds had been set aside for him, and that Hobson had picked up 25,000 pounds in a huge truck. See pages 4-6, *supra*. That they were not mere customers is further demonstrated by their advance payment of $1,500,000 for marijuana, an action that clearly facilitated the importation of marijuana in the Constellation aircraft.[12]

In short, there is no reason to remand the sufficiency question "for reconsideration in light of an accurate statement of facts" (84-1148 Pet. 27).

6. Petitioner Hobson claims (84-1148 Pet. 27-29) that government misrepresentations caused the district court to disqualify his original counsel, thereby depriving him of representation by counsel of his choice. Because Hobson failed to raise this issue in the court of appeals, it should not be considered by this Court. See, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). In any event, nothing in the record supports a claim of prosecutorial misrepresentation that caused the trial judge to be "misled" (84-1148 Pet. 28) when he issued a pretrial order disqualifying Hobson's first counsel based on the fact that the testimony of two government witnesses might have implicated that lawyer in the marijuana trafficking scheme. The decision to disqualify the lawyer was premised upon sworn affidavits of the two witnesses. Hobson unsuccessfully challenged the disqualification order prior to trial. *United States* v. *Hobson*, 672 F.2d 825 (11th Cir.), cert. denied, 459 U.S. 906 (1982). The court of appeals' opinion in that case sets forth the facts contained in the witnesses' affidavits (672 F.2d at 826); those facts leave no room to doubt the correctness of the district court's ruling. The lawyer's alleged involvement in the drug trafficking scheme was substantial, and his

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[12]Hobson's claim (84-1148 Pet. 23) that he had no knowledge of "specific delivery plans" is refuted by the trucks he and Waldrop brought to the planned landing site of the Constellation (39 R. 10-12).

representation of Hobson was frought with the potential for a serious conflict of interest. The fact that the witnesses ultimately presented their testimony without referring to the misconduct of the disqualified lawyer did not belie the allegations contained in their affidavits. Moreover, filing the motion to disqualify Hobson's original counsel was the only prudent action available to the government prior to trial since it could not know for certain whether the testimony would prove necessary or, even if not necessary, might come out at trial inadvertently. The fact that neither event occurred has no bearing on the propriety of the government's motion when filed or the district court's ruling when made.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respecfully submitted.

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